

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6144

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P/S

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

-----x
WAN SHIH HSIEH,

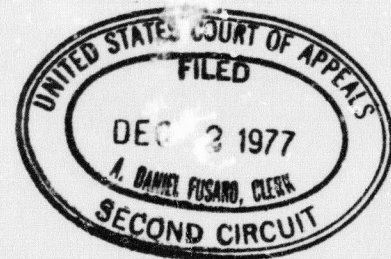
Plaintiff-Appellant,

- v -

MAURICE F. KILEY, District Director,
Immigration and Naturalization Service;
IMMIGRATION AND NATURALIZATION SERVICE,
U. S. DEPARTMENT OF JUSTICE,

Defendants-Appellees.
-----x

Docket No. 77-6144



REPLY BRIEF OF PLAINTIFF-APPELLANT

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- v - : Docket No. 77-6144
MAURICE F. KILEY, District Director, :
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U. S. DEPARTMENT OF JUSTICE, :
Defendants-Appellees. :
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REPLY BRIEF OF PLAINTIFF-APPELLANT

STATEMENT OF FACTS

It has now been two years and two months since appellees received the American Consul's request to verify certain statements made by appellant in her application for permanent resident status (A-8, A-56). During this time, all action on appellant's children's visa applications has been suspended, thereby keeping this family needlessly separated (A-55-56).

The pertinent facts pertaining to the history of this case are accurately set forth in Appellant's Brief, pages 2-5. However,

certain inaccuracies and omissions in Appellees' Brief necessitate some further explication by appellant.

Appellant's son did, as appellees assert, state that his mother was a pedicab driver in China (A-36). However, appellees fail to mention that subsequent to this statement, said son executed another statement stating that his mother had had two jobs while in China--pedicab driver and chef in a Chinese restaurant (A-39-40, A-51-52). Appellant's son's initial statement is understandable in view of the fact that he was seven (7) years old when appellant started working two jobs and thirteen (13) years old when appellant left China, which was over twelve (12) years ago (A-36).

Appellees also seem to be confused as to when the Immigration and Naturalization Service ("INS") received the request from the Consul to investigate appellant. Rather than April, 1976, as appellees contend (Appellees' Brief, p. 9), the correct date, as found by the district court, and as admitted by INS investigator Dianne Weisheit, was September, 1975 (A-8, A-56). Therefore, rather than a one month delay in assigning this case, there was an eight month delay. Furthermore, as set forth in Appellant's Brief, page 4, the affidavit of Dianne M. Weisheit is not competent evidence of the policy of the INS. In addition, even if it were admissible, this nebulous term, "lower priority", is nowhere elaborated on, and thus appellant and the Court are completely in the dark as to its meaning (see, Appellant's Brief, pp. 22-25).

Appellees continue to unjustifiably attempt to put the onus of the delays in this case on appellant. First of all, it is undisputed that the INS initially delayed eight months in commencing the investigation of appellant's case, despite at least two letters being sent by appellant's attorney in an effort to expedite the handling of appellant's case (A-8, A-56). Secondly, appellees try to make it seem that appellant terminated the interview of August 25, 1976 (Appellees' Brief, p. 13), when, in fact, Ms. Weisheit admits to terminating the interview herself (A-12, A-56). Thirdly, the appellees' claim that the interview of August 25, 1976 was properly conducted is patently false, as said interview was nothing more than a badgering game whereby the INS attempted to abuse and badger appellant by asking the same question over and over again (A-36-37). Fourthly, appellees' assertion that it is appellant's refusal to submit to another interview that is responsible for the delay in this case is absolutely frivolous (A-37-39), especially in view of the fact that the INS admits to taking virtually no action from August 25, 1976 until May 27, 1977 (A-14). Furthermore, the only purpose for such an interview is to obtain copies of appellant's tax forms, which forms were given to appellees at the interview of August 25, 1976. Nevertheless, appellees continue to ask for such forms. Lastly, appellees' characterization of Judge Wyatt's decision of September 7, 1977 is misleading, as is their claim that for eight months appellant took no action concerning this litigation (Appellees' Brief, p. 13). Judge Wyatt's opinion stated:

"The within motion is denied as without merit including that relief is asked which is just not appropriate for a court to afford." (Plaintiff's Affidavit in Support of Motion for Summary Judgment, dated June 3, 1977, p. 1).

Appellees merely quoting "without merit" in their brief certainly does not convey the true meaning of said decision. Furthermore, as is explained on pages 3 and 4 of Plaintiff's Affidavit in Support of Motion for Summary Judgment, dated June 3, 1977, appellant's attorney called the United States Attorney's office on several occasions in an attempt to get appellees to answer appellant's complaint, which answer was not produced until eight months after this action was commenced. Appellant also attempted to take a default against appellees, but the judgment clerk refused to enter a default against the United States. Nevertheless, "inactive" is hardly the proper word to describe appellant's conduct during the eight months between the service of her summons and complaint and her receipt of appellees' answer.

It should also be noted that appellees' assertion that it was appellant's household register which provided the impetus for this investigation is the first time that this reason for the investigation has been announced (Appellees' Brief, p. 8). In fact, it is well known that the household register does not maintain careful records as to employment and only deals with current employment. Thus the appellees are trying to introduce new evidence, without documentation, in their brief. This alleged evidence does not exist in the record made below.

ARGUMENT

I. APPELLEES' BRIEF, WHICH RAISES ISSUES NOT PRESENTED BY APPELLANT'S NOTICE OF APPEAL, IS PATENTLY FRIVOLOUS AND SHOULD NOT BE CONSIDERED BY THIS COURT.

"In federal appellate practice, only a party who has formally sought review of a judgment by filing a timely notice of appeal. . . will be heard to attack the judgment in the appellate court; the appeal or petition of one party does not open the judgment to attack by an appellee. . . ." 9 Moore's Federal Practice, § 204.11[2], p. 930 (footnote omitted).

"[A] party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error to to supplement the decree with respect to a matter not dealt with below." United States v. American Ry. Express Co., 265 U.S. 425 (1924).

The appellees in the instant case have filed no notice of cross-appeal. Therefore, they are limited to arguing the issues raised by appellant in her notice of appeal. However, in blatant disregard of this well-established rule,* the appellees have seen fit to attack the holding of the district court. Specifically, appellees have questioned the propriety of the district court's conclusion that not only did the INS have a duty to appellant to conduct the investigation in question, but also that appellees' actions were reviewable by the district court.

* See, e.g., Murley Constr. Co. v. Maryland Cas. Co., 300 U.S. 185 (1927); Helverling v. Pfeifer, 302 U.S. 247 (1937); Penfield Co. v. SEC, 330 U.S. 585 (1947).

In addition to frivolously and improperly raising the above-mentioned issues, the appellees have also blatantly misstated the holding of the district court. Appellees' assertion that the district court concluded that it lacked subject-matter jurisdiction (Appellees' Brief, p. 14) is sheer nonsense, as the district court expressly held:

"The rule restricting our appellate jurisdiction, enunciated in Gomez and Pena, supra, does not apply insofar as plaintiff seeks a writ of mandamus or a mandatory injunction directed to INS, and to that extent the matter is open to our review. (A-58). (Emphasis supplied.)

In view of the aforesaid, the only issue properly before this Court is whether, on the facts of this case, the district court erred in dismissing plaintiff's complaint because it could not "...conclude that INS has abused its discretion or acted arbitrarily, unreasonably or illegally. . . ." (A-64-65).

As for the various issues attempted to be raised by the appellees, it is respectfully submitted that this court refuse to consider those parts of Appellees' Brief which pertain to said issues.

II. APPELLANT IS ENTITLED TO SUMMARY JUDGMENT OR, AT A MINIMUM, TO A TRIAL OF HER CASE.

The chief question presented by this appeal is whether appellees' dereliction of duty is such an abuse of discretion as to warrant a writ of mandamus issued against them. This was the sole basis for the district court denying appellant summary judgment and dismissing her complaint as the court concluded that there was no such abuse (A-64-65).

Appellees, in their answering brief, make no reference at all to this part of the district court's decision, despite the fact that Appellant devoted fifteen (15) pages of her brief to this issue, Appellant's Brief, pp. 7-21, and despite the fact that this was an issue which appellees could legitimately argue (see, paragraph I, supra).

That the incredible delay is such an abuse of discretion as to entitle appellant to summary judgment is patent (see, Appellant's Brief, pp. 7-15). Briefly stated, appellant's argument is that the appellees' justification for this delay is not persuasive, while the harm being inflicted upon appellant is great. See, Goldman, Administrative Delay and Judicial Relief, 66 Michigan Law Review 1423 (1968).

Appellees' failure to dispute this section of Appellant's Brief lends further support for appellant's position.

At a minimum, appellant is entitled to a trial in order to ascertain whether or not appellees' justifications are, in fact, credible.

III. THE DISTRICT COURT CORRECTLY HELD THAT IT HAD JURISDICTION OVER THIS CASE, BUT ERRED IN NOT GRANTING A WRIT OF MANDAMUS.

A. 28 U.S.C. § 1361 Conferred Jurisdiction in This Case.

28 U.S.C. § 1361 provides that:

"The district court shall have original jurisdiction of any action in the nature of

mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Clearly, appellant's claim falls squarely within the ambit of this section and appellees' assertion that the district court found that it lacked subject-matter jurisdiction is meritless. In fact, the district court expressly stated:

"The rule restricting our appellate jurisdiction, enunciated in Gomez and Pena, supra, does not apply insofar as plaintiff seeks a writ of mandamus or a mandatory injunction directed to INS, and to that extent the matter is open to our review." (A-58). (Emphasis supplied.)

Rather than dismissing appellant's claim for lack of jurisdiction, the district court dismissed because it could not "...conclude that INS has abused its discretion or acted arbitrarily, unreasonably or illegally. . . ." (A-64-65.) This is the primary issue presented by this appeal. The other conclusions reached by the district court, i.e., that the INS owed a duty to appellant to conduct this investigation and to complete it within a reasonable time, were correctly decided (A-65) and have not been effectively or properly challenged (see, paragraph I, supra).

B. The District Court Erred in Not Issuing a Writ of Mandamus Directed at Appellees, as Appellant is Clearly Entitled to Such Equitable Relief.

Again, appellees incorrectly assert that the district court found that "28 U.S.C. § 1361 did not confer subject-matter jurisdiction upon the court to review the reasonableness of the Service's

response to the Consulate's inquiry. . . ." (Appellees' Brief, p. 17) This assertion is incredible in view of the express holding of the district court that:

"The rule restricting our appellate jurisdiction. . . does not apply insofar as plaintiff seeks a writ of mandamus or a mandatory injunction directed to INS, and to the extent the matter is open to our review." (A-58) (emphasis supplied).

Moreover, obviously the conduct of the INS was reviewed by the district court, for how else could it hold that ". . . we cannot conclude that INS has abused its discretion or acted arbitrarily, unreasonably or illegally. . . ." (A-64-65).

1. Appellant has "clean hands".

Appellees' assertion that appellant's conduct precludes her from equitable relief is frivolous (Appellees' Brief, p. 18). Appellant in no way attempted to delay either this litigation or the underlying administrative investigation. All she has done is to try to expedite the issuance of immigration visas for her children, a process which has taken over two-and-one-half years as of this date (A-55).

It was not appellant who delayed eight months in assigning this case for investigation (A-8). But it was appellant's attorney who wrote three letters to the INS in an effort to move this case along (A-31-32).

It was not appellant who terminated the interview of August 25, 1976, it was the INS (A-12).

Appellant has done no more than pursue her available legal remedies. This is distinguishable from Kama Rippa Music, Inc. v. Schekeryk, 510 F.2d 837 (2d Cir. 1975), where in a suit for specific performance of a contract the plaintiff sought to justify its late payment on the grounds that such payment would violate a court order attaching plaintiff's indebtedness. However, such attachment was procured by plaintiff itself, which prompted the court to state that ". . . the plea to equity of a party which attaches its own indebtedness as a ploy to avoid its contractual duties will fall on deaf ears." at 544. The relevance of that case to the case at bar is obscure, to say the least.

2. Appellant has a clear right to the relief sought.

Once again appellees attempt to cloud the issue of this case by arguing that appellant has no right to compel the admission of her children into the United States (Appellees' Brief, p. 20).

This is not the relief sought by appellant. Appellant merely wants the INS to respond to the Consul's inquiries.

Appellees' assertion that appellant has no right to have the INS complete her investigation prior to those which were requested earlier or were assigned a higher priority (Appellees' Brief, p. 20) is totally irrelevant to this case. Appellant simply wants her case, which was started over two years ago, to be processed, as it already should have been. The cases cited by appellees are inapplicable to the instant case.

For example, in Small v. Kiley, Dkt. No. 76-6162, Slip Op. 2221, 2226, n.3 (2d Cir. March 9, 1977), the court in dicta stated that "[t]here also is a serious question whether a priority directive such as the one alleged to be causing the delay here would be subject to judicial review at all, absent a clear statutory violation." In the instant case, the general directive is not being attacked, although appellant does contend that the directive is not even properly before the court (see, Appellant's Brief, pp. 22-24).

And in REA Express v. United States of America, Dkt. No. 77-4278, Slip Op. 5989, 6007 (2d Cir. Sept. 16, 1977), a case dealing with an agency's dismissal of an application for permanent operating authority of a nationwide system of express service due to lack of prosecution, the court stated that ". . .docket management is a discretionary matter as to which courts virtually never substitute their judgment for that of an administrative agency." Again, the relevance of this case to the instant case is remote at best.

The relevant cases have already been discussed in Appellant's Brief, pages 19-21, and they clearly establish the fact that appellant has a clear right to the relief sought. See, generally, United States ex rel. Schonbrun v. Commanding Officer, Armed Forces, 403 F.2d 371 (2d Cir. 1968), cert. denied, 394 U.S. 929 (1969); Nixon v. Secretary of the Navy, 422 F.2d 934 (2d Cir. 1970); Feliciano v. Laird, 426 F.2d 424 (2d Cir. 1970); Lovallo v. Froehlke, 468 F.2d 340 (2d Cir. 1972), cert. denied 411 U.S. 918 (1973); Leonhard v. Mitchell, 473 F.2d 709

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3. The INS has a duty to conduct and complete the investigation.

Once again appellees attempt to undermine the district court's well-reasoned and persuasive analysis finding that the INC has a duty to conduct and complete the investigation in this case by erroneously stating that the district court misconstrued appellant's claim (Appellee's Brief, p. 21).

Appellees contention that the Service's investigation is limited to the alleged fraud of appellant is disingenuous, as it ignores the ramifications of said investigation on appellant's children.

Appellees attempt to have this Court look at this case as if appellant's children are non-existent. In fact, it is the presence of these children which imposes the duty on the INS, for as the district court found:

"Failure to conduct an investigation of plaintiff's alleged fraud would not prejudice her if the results of such investigation were to be used solely in possible proceedings to rescind her resident alien status for she could continue to hold that status. The situation is entirely different here, however, where the Consul has suspended action on her children's visa applications pending an investigation of plaintiff's alleged fraud in the procurement of her resident alien status as it relates to the possible revocation of her children's preference status. Plaintiff is seriously prejudiced because the consul will not issue the visas until the

investigation is completed and she is deprived of her children in the interim." (A-62-63) (emphasis in original) (footnote omitted).

Appellees' argument would be appropriate if appellant had no children applying for immigration visas, but since she does, appellees' argument is irrelevant to the case at bar.

Similarly, appellees' policy arguments are unconvincing and far fetched. To preclude justice from being done in the instant case by conjecturing that every alien hereinafter subject to rescission would have relatives apply for admission and then said alien would mandamus the INS is absurd, as is the claim that imposing a duty on the INS will discourage the INS from responding to such inquiries of a consul. (Appellees' Brief, pp. 23-24.)

First of all, mandamus is not available in every case, only in cases such as this one where the delay is patently unreasonable. Clearly then, mandamus actions would not become commonplace.

Furthermore, by imposing this duty the whole procedure may become more efficient as the INS will know that they are subject to suit. This possible beneficial side effect should not be overlooked.

Finally, appellees' claim that imposing a duty in a case such as the instant one will lead to extensive litigation involving review of the manner and results of these investigations (Appellees' Brief, p. 24) is unfounded, because this duty has nothing to do with completed investigations; it deals exclusively with investigations pending for an unreasonably long time. Once again appellees cite an

inapposite case, as Gomez v. Kissinger, 534 F.2d 518 (2d Cir. 1976), dealt with the actions of a consular official abroad who denied a visa on the grounds that an alleged marriage was invalid. In that case, there was a decision by a consular official, while here there is inaction by the INS. Again, the relevancy of the cited case to the case at bar is not readily apparent.

4. Appellant has no other
adequate remedy available.

That irreparable harm exists is obvious, as for over two years the inaction of the INS has prevented appellant from seeing her children.

Appellees' statement that the record lacks proof of any irreparable harm is as insensitive as it is inaccurate. Pages 15 and 16 of Appellant's Brief set forth the irreparable harm being caused. Moreover, the district court noted the harm being suffered (A-63). In addition, it seems rather obvious, even without spelling it out, what and how severe the irreparable harm is. This is just another example of the callous attitude of the INS towards this case.

In addition, page 18 of Appellant's Brief, discusses alternatives available to appellant, and demonstrates their inadequacy. Briefly stated, since she has been unable to attain satisfaction from the INS, her alternatives are to either continue waiting, thereby prolonging her separation from her children, or to go to China. That neither is "adequate" is manifest. See, Pena v. Kissinger, 409 F.Supp. 1182, 1184 (S.D.N.Y. 1976).

CONCLUSION

The district court's decision dismissing appellant's complaint should be vacated and an order granting appellant summary judgment and ordering appellees to complete the investigation and respond to the consul's inquiries should be entered.

Dated: New York, New York
December 1, 1977

Respectfully submitted,

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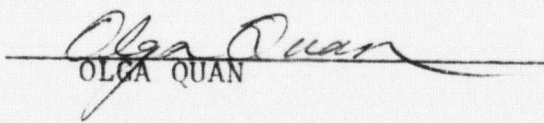
AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

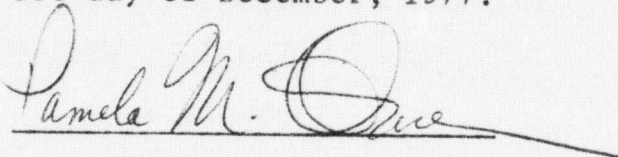
OLGA QUAN, being duly sworn, deposes and says:

1. Deponent is not a party to the within action, is over 18 years of age, and resides at 27 East 37th Street, New York, New York.

2. On December 1, 1977, deponent served the within Reply Brief of Plaintiff-Appellant upon Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, attorney for the appellees in this action, at One St. Andrew's Plaza, New York, New York 10007, Attention Robert S. Groban, Jr., Esq., the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.


OLGA QUAN

Sworn to before me this
1st day of December, 1977.



PAMELA M. OWEN
NOTARY PUBLIC, State of New York
No. 21-402637
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1979

